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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 371

UNITED TOWING COMPANY, ET AL., *Petitioners*

v.

H. A. PHILLIPS, TRUSTEE, *Respondent*

On Petition For Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR RESPONDENT

THAD GRUNDY
Counsel for Respondent
1720 Esperson Building
Houston 2, Texas

ALPHA LAW BRIEF CO., 402 M & M BLDG., HOUSTON 2

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BRIEF FOR RESPONDENT

To The Honorable The Chief Justice And The Associate Justices of the Supreme Court of the United States:

H. A. PHILLIPS, Trustee of the Estate of C. J. Dick Towing Company, Respondent herein, respectfully presents this brief in opposition to the petition for writ of certiorari.

Opinions Below

The citations are correct. The opinion of the District Court has not yet been published.

Jurisdiction

Petitioners properly invoke the jurisdiction of this Court.

Question Presented

Whether a transfer of all of the capital stock of one Texas corporation by a second Texas corporation to a third Texas corporation, while the transferor was insolvent and while the same three persons constituted all of the officers and directors, and substantially all of the stockholders, of both the transferor and the transferee, was a fraudulent conveyance within the meaning of Section 67d of the *Bankruptcy Act* and Article 3996, *V.A.C.S. of Texas*.

Statutes Involved

The statutes involved are Sections 67d (2) (a) [11 U.S.C.A. 107d (2) (a)], 67d (2) (b) [11 U.S.C.A. 107d (2) (b)], and 67d (2) (d) [11 U.S.C.A. 107d (2) (d)] of the Bankruptcy Act, and Articles 1358-1 (a) and 3996, *Vernon's Annotated Civil Statutes of Texas* (Petition, 3-4).

Statement

The statement of the case made by petitioners is incomplete, inaccurate, and misleading.

John D. Jones, Holt P. Daniels, and Harland I. Casteel owned all of the stock of C. J. Dick Towing Company, herein sometimes called Dick or the Bankrupt. These three individuals also owned substantially all of the stock of

United Towing Company, herein called United. Dick owned all of the stock of Greens Bayou Marine Service Company, herein called Greens Bayou. The three individuals were the officers and directors of each of these three Texas corporations. On February 26, 1954, an involuntary petition in bankruptcy was filed against Dick and it was thereafter adjudged bankrupt. H. A. Phillips was elected trustee of the Bankrupt, and brought suit in the District Court against United, Greens Bayou, Jones and Daniels to set aside as fraudulent the transfer of the Greens Bayou stock by Dick to United on October 1, 1953. Casteel lived in Pennsylvania and was not made a party.

Respondent alleged:

(1) That said transfer was a fraudulent conveyance within the meaning of Section 67d (2) (a) of the Bankruptcy Act, in that it was made without fair consideration when Bankrupt was or was thereby rendered insolvent.

(2) That said transfer was a fraudulent conveyance within the meaning of Section 67d (2) (b) of the Bankruptcy Act, in that it was made without fair consideration when Bankrupt was engaged in business for which the property remaining in its hands was an unreasonably small capital.

(3) That said transfer was a fraudulent conveyance within the meaning of Section 67d (2) (d) of the Bankruptcy Act, in that it was made with actual intent to hinder, delay and defraud creditors.

(4) That said transfer was fraudulent within the meaning of Article 3996, V.A.C.S. of Texas, in that it was made with an intent to delay, hinder, or defraud creditors.

(5) That said transfer was against the public policy of the State of Texas and was therefore void and unenforceable, in that the said Jones, Daniels, and Casteel represented dual and adverse interests in acting as officers, directors, and stockholders of Bankrupt and United.

Respondent also alleged other grounds for the invalidity of such transfer, but such grounds were disposed of adversely to respondent by the District Court and were not carried forward on appeal. Petitioners denied that the transfer was invalid, and pleaded further that Bankrupt had pledged the Greens Bayou stock to United more than one year prior to bankruptcy.

The case was tried before the District Court without a jury. Daniels was called by the Trustee as an adverse witness and testified at length. Jones, although present in the courtroom during the entire trial, did not take the stand either to explain or deny any of the transactions shown by the record. Casteel, although he knew of the suit, did not appear and testify, nor was his deposition taken (R. 304-305).

The District Court made careful and detailed findings of fact and conclusions of law (R. 292-302). The Court of Appeals set out a somewhat more condensed statement of the evidence in its opinion (Appendix to Petition 16-19). Finally, the Court of Appeals, after holding that the findings and conclusions of the District Court were "amply supported by the evidence," concluded:

> "We think the judgment entered was a proper one. It carries out sound policy as to the fiduciary obligations imposed upon corporate directors. The judgment is affirmed."

With the concise and accurate statements of the case by both of the lower courts having already been presented to this Honorable Court in the record and in the petition, respondent believes that it would be redundant and probably in violation of Rule 40 of this Court for him to undertake again to restate the evidence.

Argument

While in complete control of both Bankrupt and United, and while Bankrupt was hopelessly insolvent, Jones, Daniels and Casteel, "sitting on both sides of the fence" (R. 63-64), transferred the Greens Bayou stock from Bankrupt to United — from their "right-hand pocket" to their "left-hand pocket" (R. 154, 208-210). The evidence of their fraud was spelled out in detail in the corporate minutes which Daniels prepared (R. 295-298; Appendix to Petition, 17-18); in the false information given by Daniels to Dun & Bradstreet (R. 186-189, 196-199); and in the financial statement of Dick furnished by petitioners in 1953, which was false by $331,714.95 (R. 262-265). Petitioners had every opportunity to convince the District Court and the Court of Appeals of the fairness of their transactions.

There is no conflict of decisions; there is no important question of federal law; there is in this petition nothing but an attempt to gain still another review of the evidence.

1. *The decisions of the District Court and the Court of Appeals are correct.*

Respondent contended in the trial court that the transfer was made on October 1, 1953, that it was fraudulent under the Bankruptcy Act and under the Texas statute, and that it was void under Texas law because of the representation

by petitioners of dual and adverse interests as officers, directors and stockholders of Dick and United. Petitioners denied these allegations and contended that a valid pledge of the stock had been made in December, 1952, or that an agreement to transfer the stock had been made in January or February, 1953. The District Court found that the transfer was fraudulent and void, and that *no valid pledge of the stock had been made*, relying strongly upon the decision of this Honorable Court in *Corsicana National Bank v. Johnson*, 251 U.S. 68, 64 L. Ed. 141, 40 S. Ct. 82. The Court of Appeals, addressing its attention particularly to the defensive theory of a pledge alleged by respondent but not proven to the satisfaction of the trial court, reviewed the evidence offered by petitioners in support of their theory, and concluded:

> "Amply supported by the evidence are the findings that there was no valid pledge of the Greens Bayou stock in December, 1952, and no valid transfer or agreement to transfer the stock prior to October, 1953." (Appendix to Petition, 23).

The Court of Appeals likewise followed the Corsicana Bank case, and also the leading case of *Geddes v. Anaconda Mining Co.*, 254 U.S. 590, L. Ed. 425, 41 S. Ct. 209.

Petitioners are here insisting that the trial judge's findings against their contentions, reviewed and concurred in so emphatically by the Court of Appeals, were wrong, and that this Honorable Court should grant certiorari to review again these findings. This argument had been rejected so many times by this Honorable Court that even a cursory examination by petitioners of the decisions should have been sufficient to convince them that this Court will not re-

view concurrent findings of fact by the two courts below, in the absence of exceptional showing of error. In *Comstock v. Group of Institutional Investors*, 335 U.S. 211, 92 L. Ed. 1911, 68 S. Ct. 1454, it was said that "a seasoned and wise rule of this Court makes concurrent findings of two courts below final here in the absence of very exceptional showing of error;" and in *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 93 L. Ed. 672, 69 S. Ct. 535, the Court, referring to Rule 52(a) of the Federal Rules of Civil Procedure that findings of fact shall not be set aside unless clearly erroneous, and that due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses, restated the rule (336 U.S. at 275):

> "The rule requires that an appellate court make allowance for the advantages possessed by the trial court in appraising the significance of conflicting testimony and reverse only clearly erroneous findings. These are manifestly supported by substantial evidence and the Court of Appeals found them supported by the weight of the evidence — indeed found the evidence to warrant support of the patent even in matters not found by the trial court. A court of law, such as this Court is; rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."

To the same effect is the language of this Court in *Just v. Chambers*, 312 U.S. 383, 85 L. Ed. 903, 61 S. Ct. 687 (at page 385 of 312 U.S.):

> "In support of the judgment of the Circuit Court of Appeals, respondent asks us to review the evidence with respect to the cause of the claimants' injuries and

> the breach of duty by the shipowner, contending that the evidence was insufficient to support the findings. Applying the well-established rule, we accept the concurrent findings of the courts below upon these matters (Texas & New Orleans R. Co. v. Brotherhood of Railway & S.S. Clerks, 281 U.S. 548, 558, 50 S. Ct. 427, 429, 74 L. Ed. 1034) and we confine our attention to the question of the survival of the causes of action."

The principle that this Court will not grant certiorari merely to act as a fact finding body was aptly stated by Mr. Chief Justice Taft in *Magnum Import Co. v. DeSpoturno Coty*, 262 U.S. 159, 67 L. Ed. 922, 43 S. Ct. 531, in saying that certiorari "jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing."

2. *There are no grounds under Rule 19 of this Court for granting the writ of certiorari.*

(a) *The decision is not in conflict with the decision of another Court of Appeals.*

Neither the petition nor the record even remotely suggest such a conflict. The Court of Appeals in fact applied settled law with respect to fraudulent conveyances, as expressed by numerous decisions of that court and the courts of other circuits.

(b) *There is no decision of an important state question in conflict with applicable state law.*

Although petitioners say that the decision is in disregard of Article 1358-1, V.A.C.S. of Texas (Petition, 10), what the lower courts actually did was to apply correctly the pertinent Texas statutes and Texas case law. Article 1358-1

provides in part for transfer of title to a stock certificate only by delivery of the certificate, endorsed by the owner. The Texas courts hold that in order to constitute a valid pledge of a stock certificate by a corporation as security for a loan, there must be (1) a valid debt owing by the corporation; (2) authority to endorse and deliver the stock certificate as security for the loan, duly vested in an officer or agent by the directors; and (3) delivery of the certificate, properly endorsed. 10 *Texas Jurisprudence*, 961, 962, 977-981, and cases cited; 33 *Texas Jurisprudence*, 682-683, and cases cited. The only fact found by the District Court in support of petitioners' theory of pledge was that Daniels took the Greens Bayou certificate from the safe of Bankrupt and carried it across the hall to the safe of United (R. 307), and the Court rightly concluded that this act, *standing alone*, did not constitute a pledge of the stock. To have held otherwise would have presented the conflict with state law which petitioners seek to inject.

The other Texas statute involved is Article 3996, V.A.C.S. The rule in Texas is that whether a conveyance is in fraud of creditors is a question of fact in each case, *Griffin v. McCullough Tool Co.*, 265 S.W. 2d 131 (writ of error refused, N.R.E.); and that a voluntary conveyance for an inadequate consideration is prima facie fraudulent as to existing creditors, even in the absence of a dishonest motive, *Dixon v. Sanderson*, 72 Tex. 359, 10 S.W. 535; *Paddock v. Jackson*, 41 S.W. 700, 702 (writ of error refused). Voluntary conveyance of property by one indebted is evidence of a fraudulent intent, and the burden of proving that such intent did not exist is upon the donor, *Dixon v. Sanderson*, supra. Petitioners made no effort to meet this burden of proof, and are further circumscribed by the specific

evidence of their *actual* intent to defraud above set forth in the first paragraph of this argument (supra, p. 4).

The trial court also concluded that the transfer of the Greens Bayou stock was voidable because of the representation of dual and adverse interests by Jones, Daniels and Casteel, following the rule of the *Corsicana National Bank* case, and the Court of Appeals agreed. That this decision certainly is not in conflict with applicable state law may be seen by an examination of the Texas rule, which is considerably more stringent. A transaction of this nature is held to be against public policy and unenforceable against the corporation, as where the directors have a direct personal financial interest in the matter, there is no one to represent the corporation. Such contracts are absolutely *void*, and may not be adopted or ratified. *Mercury Life & Health Company v. Hughes*, 271 S.W. 2d 842, 845-846 (writ of error refused); *Dunaghan v. Bushey*, 152 Tex. 630, 263 S.W. 2d 148.

In the instant case, certain routine questions involving the application of Texas statutes and rules of Texas decisions were passed upon by a judge who has been identified with the practice of law in his native state for more than half a century, first as a practicing attorney and then as Judge of the Southern District of Texas for over 25 years. His rulings were scrutinized and approved by an appellate court whose membership included another judge from that state, who likewise had been first an attorney and then an occupant of that same district bench. Such interpretations of local law have long been considered binding by this Honorable Court. *Edward Hines Yellow Pine Trustees v. Martin*, 268 U.S. 458, 69 L. Ed. 1050, 45 S. Ct. 543; *Spiegel's Estate v. Commissioner*, 335 U.S. 701, 93 L. Ed. 330, 69 S. Ct. 301.

(c) *The decision presents no important question of federal law.*

The decision of the courts below follows a familiar and well-defined road in applying established principles of law to a very ordinary situation. Petitioners, trapped by their own greed in their attempt to filch from the dwindling treasury of a foundering bankrupt the only remaining asset of any substantial value, are unable even to state the existence of a federal question. Their scattergun charge that a finding of the court below is in violation of the Fourteenth Amendment to the Constitution of the United States (which charge is unsupported by evidence, argument or authorities) is met head on by the decision of this Honorable Court in *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508, 68 L. Ed. 413, 44 S. Ct. 164:

> "This writ must be dismissed. The petition therefor stated that the cause involved a grave question of vital importance to the public, and alleged as special reason for its re-examination that the decree would deprive petitioner of property without due process of law, and of freedom to contract, contrary to the Federal Constitution. The opinion below is reported in 33 A.L.R. 626, 282 Fed. 837.
>
> "The argument developed that the controverted question was whether the evidence sufficed to establish actual dedication of petitioner's property to public use, — primarily a question of fact. That is not the ground upon which we granted the petition, and, if sufficiently developed, would not have moved us thereto."

The petition in the instant case is cut from the same cloth, and deserves the same fate.

(d) *There is no decision of a federal question in conflict with applicable decisions of this Court.*

Respondent has already pointed out that the courts below followed the principles enunciated by this Court in *Corsicana National Bank v. Johnson* and *Geddes v. Anaconda Mining Company*, supra. To the same effect are the leading cases of *Buffum, Trustee v. Peter Barceloux Co.*, 289 U.S. 227, 77 L. Ed. 1140, 53 S. Ct. 539, and *Pepper v. Litton*, 308 U.S. 295, 84 L. Ed. 28, 60 S. Ct. 238, which lend additional support to the decision in the case at bar. There is not the faintest suggestion to the contrary in the petition.

3. *The case is moot.*

If this Honorable Court were able to extract from the hodgepodge of conflicting and confusing questions, specifications of error, and reasons for granting the writ strewn throughout the petition, a single ground for consideration of the case on its merits, respondent respectfully suggests that even in that event the case has become moot. The decision of the courts below may be grounded solely on the application of the rule of Texas law which renders void the transaction by petitioners with themselves as officers, directors and stockholders of Bankrupt and United. Petitioners have not in any manner presented that question to this Court.

4. *The petition should be denied, with damages for delay.*

The grounds urged by petitioners herein for granting the writ are entirely without substance The question supposedly presented by petitioners have all been foreclosed by

decisions of this Court. This is a plain case in which the Court should apply Rule 56(4) and award damages for delay. Petitioners have been in possession of the assets of Greens Bayou for four and one-half years, and nearly five months have already elapsed since the judgment of the Court of Appeals (rendered April 5, 1957) became final when the petition for rehearing was overruled on May 17, 1957 (R. 368, 393). Respondent respectfully suggests that if this Court sees fit to deny the petition, damages amounting to ten percent of the appraised value of the real property owned by Greens Bayou ($87,951.00; R. 49) would be appropriate.

Conclusion

The petition for a writ of certiorari is utterly without merit and should be denied, with damages to respondent for delay.

Respectfully submitted,

THAD GRUNDY
Attorney for H. A. Phillips, Trustee
1720 Niels Esperson Building
Houston 2, Texas